

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOEL ALCARAZ-GONZALEZ,

Case No.: 3:22-cv-00393-MMD-CSD

Plaintiff

Order

v.

Re: ECF Nos. 1-1, 4

RENO POLICE DEPARTMENT, et al.,

Defendants

Plaintiff, who is an inmate in the Washoe County Detention Facility (WCDF), has filed an application to proceed in forma pauperis (IFP) (ECF No. 4) and pro se complaint (ECF No. 1-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

The Local Rules of Practice for the District of Nevada provide: “Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

“[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)

1 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
2 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

3 An inmate submitting an application to proceed IFP must also “submit a certificate from
4 the institution certifying the amount of funds currently held in the applicant’s trust account at the
5 institution and the net deposits in the applicant’s account for the six months prior to the date of
6 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
7 at the institution for less than six months, “the certificate must show the account’s activity for
8 this shortened period.” LSR 1-2.

9 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
10 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
11 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
12 deposits or the average monthly balance for the six-month period immediately preceding the
13 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
14 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
15 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody
16 of the prisoner will forward payments from the prisoner’s account to the court clerk each time
17 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

18 Plaintiff’s certified account statement indicates that his average monthly balance for the
19 last six months was \$76.92 and his average monthly deposits were \$76.67.

20 Plaintiff’s application to proceed IFP is granted. Plaintiff is required to pay an initial
21 partial filing fee in the amount of \$15.38 (20 percent of \$76.92). Thereafter, whenever his prison
22 account exceeds \$10, he must make monthly payments in the amount of 20 percent of the
23 preceding month’s income credited to his account until the \$350 filing fee is paid.

II. SCREENING

A. Standard

Under the statute governing IFP proceedings, “the court shall dismiss the case at any time if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

In addition, under 28 U.S.C. § 1915A, “[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A(a). In conducting this review, the court “shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b)(1)-(2).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a complaint under these statutes, the court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

The court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*,

1 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less
2 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
3 (1980) (internal quotation marks and citation omitted).

4 A complaint must contain more than a “formulaic recitation of the elements of a cause of
5 action,” it must contain factual allegations sufficient to “raise a right to relief above the
6 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
7 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
8 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a
9 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
10 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11 A dismissal should not be without leave to amend unless it is clear from the face of the
12 complaint that the action is frivolous and could not be amended to state a federal claim, or the
13 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
14 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

15 **B. Plaintiff’s Complaint**

16 Plaintiff’s complaint names as defendants: Reno Police Department (RPD); Sparks Police
17 Department (SPD), RPD Officer Joclyn Benven, SPD K-9 Unit Official T. Radley, RPD Law
18 Enforcement Official J. Kincaid. Plaintiff asserts that his rights under the First, Fourth, Eighth,
19 and Fourteenth Amendments have been violated.

20 Plaintiff alleges that on April 27, 2022, he was illegally searched and seized, and he was
21 beaten when he was tackled to the ground and punched in the face, forcing him to seek medical
22 attention. He mentions RPD and SPD officers of the Regional Crime Suppression Unit as well as
23 Detectives Gamboa, Sandoval, Sheffield, and defendants Benven, Kincaid, and Radley.

1 Claims for unlawful search and seizure and excessive force by a free citizen are governed
2 by the Fourth Amendment, and not the First, Eighth or Fourteenth Amendments. U.S. Const.
3 amend IV; *Graham v. Connor*, 490 U.S. 386, 395 (1989).

4 To adequately plead the section 1983 elements, a complaint must identify what
5 constitutional right each defendant violated, and provide sufficient *facts* to plausibly support
6 each violation. *See e.g., Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (noting defendants
7 must personally participate in misconduct to be liable under section 1983).

8 Plaintiff references defendants Benvin, Radley and Kincaid; however, he includes no
9 specific factual allegations regarding what they each did to violate his rights.

10 Plaintiff also mentions Detectives Gamboa, Sandoval and Sheffield, but they are not
11 named as defendants in the caption, and Plaintiff does not include any specific factual allegations
12 detailing the role they played in any asserted constitutional violation. In other words, it is not
13 clear Plaintiff intends to proceed against these individuals, and even if he does, he does not
14 include sufficient factual allegations to state a claim against them.

15 Plaintiff names RPD and SPD, however, they are not proper defendants in this action. A
16 public agency is not a person or entity subject to suit unless that agency is a separate legal entity.
17 *Hervey v. Estes*, 65 F.3d 784, 791-92 (9th Cir. 1995). Applying Federal Rule of Civil Procedure
18 17(b)¹, the Ninth Circuit has held that state law determines the issue of whether a department of
19 a municipality may sue or be sued. *See e.g. Streit v. County of Los Angeles*, 236 F.3d 552, 565
20 (9th Cir. 2001).

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23 ¹ Rule 17(b) states that capacity to sue or be sued (other than for an individual or corporation) is
determined by the law of the state where the court is located. Fed. R. Civ. P. 17(b)(3).

1 In Nevada, each county (or incorporated city or town within the county) is a political
2 subdivision of the state and an independent legal entity, which means it can sue or be sued. *See*
3 *Clark County v. Lewis*, 88 Nev. 254, 498 P.2d 363, 365 (Nev. 1972); Nevada Revised Statute
4 (NRS) 280.080; NRS 41.0305. A department of a county, city or town, however, "may not, in the
5 department name, sue or be sued" without statutory authorization. *See Wayment v. Holmes*, 912
6 P.2d 816, 819, 112 Nev. 232, 238 (Nev. 1996) (concluding that the "Washoe County District
7 Attorney's office is not a suable entity because it is a department of Washoe County, not a
8 political subdivision" and noting the State had not waived immunity on behalf of its departments
9 of political subdivisions so the District Attorney's Office had not been conferred the power to sue
10 or be sued) (citing Nev. Rev. Stat. (NRS) 41.031); *see also Wright v. City of Las Vegas*, 395
11 F.Supp.2d 789, 794 (S.D. Iowa 2005); *Schneider v. Elko County Sheriff's Dep't*, 17 F.Supp.2d
12 1162, 1165 (D. Nev. 1998) (finding that Elko County Sheriff's Department lacked capacity to be
13 sued).

14 Therefore, RPD and SPD will be dismissed. If a plaintiff improperly names a city or
15 county department that lacks capacity to be sued, the court may order the proper party (generally
16 the county or city) be substituted into the case. *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir.
17 2015).

18 While Reno or Sparks might be proper parties, municipalities may be only be liable for
19 the infringement of constitutional rights under certain circumstances. *Monell v. Dep't of Soc.*
20 *Servs.*, 436 U.S. 658, 690-95 (1978). "In particular, municipalities may be liable under § 1983
21 for constitutional injuries pursuant to (1) an official policy; (2) a pervasive practice or custom;
22 (3) a failure to train, supervise, or discipline; or (4) a decision or act by a final policymaker."
23 *Horton v. City of Santa Maria*, 915 F.3d 592, 602-03 (9th Cir. 2019). A municipality may not be

sued under a respondeat superior theory. *Id.* at 603. (citing *Monell*, 436 U.S. at 693-95). Instead, “[a] plaintiff must therefore show ‘*deliberate* action attributable to the municipality [that] directly caused a deprivation of federal rights.’” *Id.* (quoting *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 415 (1997)) (emphasis original).

Here, Plaintiff has not included allegations sufficient to state a claim against Reno or Sparks under *Monell*; however, he will be given leave to amend to attempt to do so.

In sum, Plaintiff’s complaint will be dismissed; however, he will be given leave to amend to attempt to correct the deficiencies noted in this Order.

The court notes that to the extent Plaintiff has not been convicted and his underlying criminal case is ongoing, if he amends to state colorable Fourth Amendment search and seizure claims, the court will likely stay those claims pending resolution of his underlying criminal case. *See Wallace v. Kato*, 549 U.S. 384, 393-94 (2007). “If the plaintiff is ultimately convicted, and if the stayed civil action would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.” *Id.* at 394 (citations omitted).

III. CONCLUSION

(1) Plaintiff’s IFP application (ECF No. 4) is **GRANTED**; however, within **30 DAYS** Plaintiff must pay, through WCDF, an initial partial filing fee in the amount of \$15.38. Thereafter, whenever his prison account exceeds \$10, he is required to make monthly payments in the amount of 20 percent of the preceding month’s income credited to his account until the full \$350 filing fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful. The Clerk must **SEND** a copy of this Order to the attention of **Chief of Inmate Services for the WCDF**, 911 . Parr Blvd., Reno, NV 89512.

(2) The Clerk will **FILE** the complaint (ECF No. 1-1).

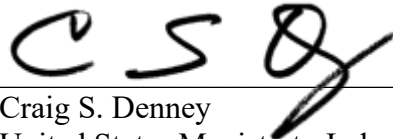
1 (3) The Complaint is **DISMISSED WITH LEAVE TO AMEND**.

2 (4) The Clerk shall **SEND** Plaintiff the instructions for filing a civil rights complaint by
3 an incarcerated individual and form civil rights complaint by an inmate.

4 (5) Plaintiff has **30 DAYS** from the date of this Order to file an amended complaint
5 correcting the deficiencies noted above. The amended complaint must be complete in and of
6 itself without referring or incorporating by reference any previous complaint. Any allegations,
7 parties, or requests for relief from a prior complaint that are not carried forwarded in the
8 amended complaint will no longer be before the court. Plaintiff shall check the box for the first
9 amended complaint on the court's form civil rights complaint. If Plaintiff fails to file an amended
10 complaint within the 30 days, the action may be dismissed.

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12 **IT IS SO ORDERED.**

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14 Dated: February 1, 2023

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16 Craig S. Denney
17 United States Magistrate Judge
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